Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

UNIVERSITY OF PHOENIX,

Petitioner,

v.

UNITED STATES EX REL. MARY HENDOW AND JULIE ALBERTSON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Participants in many federal programs, including the student financial aid program under Title IV of the Higher Education Act, must satisfy hundreds of regulatory requirements to establish their program eligibility. In direct conflict with the decisions of five other circuits, the Ninth Circuit held that any alleged "course of conduct" that knowingly violates one of these program eligibility requirements is sufficient to render an otherwise truthful claim for payment "false or fraudulent" under the False Claims Act, even if the government has not conditioned payment on compliance with that requirement. The question presented is whether an allegation that a claimant has knowingly violated a regulatory requirement that constitutes a threshold condition of program eligibility—rather than a condition of government payment—is sufficient to state a claim under the False Claims Act.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all the parties to the proceeding below.

Pursuant to this Court's Rule 29.6, undersigned counsel state that the University of Phoenix, Inc. ("UOP") is a wholly owned subsidiary of Apollo Group, Inc. No other publicly held company owns 10% or more of UOP's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner University of Phoenix, Inc. ("UOP") respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The court of appeals' opinion is reported at 461 F.3d 1166. Pet. App. 1a. The order denying UOP's petition for rehearing and petition for rehearing en banc is unreported. *Id.* at 24a. The opinion of the United States District Court for the Eastern District of California is unpublished but is electronically reported at 2004 WL 3611690. *Id.* at 20a.

JURISDICTION

The district court had jurisdiction over respondents' claims pursuant to 28 U.S.C. § 1331. The court of appeals had jurisdiction to review the district court's final judgment pursuant to 28 U.S.C. § 1291. The court of appeals filed its opinion on September 5, 2006. It denied UOP's timely petition for rehearing and petition for rehearing en banc on October 24, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Title 31 U.S.C. § 3729 provides, in relevant part:

§ 3729. False claims

(a) Liability for certain acts. Any person who—

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government . . .

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person . . . .

STATEMENT

This case raises several issues of exceptional importance to the administration of federal government programs involving hundreds of billions of dollars and, specifically, to the application of the False Claims Act ("FCA"), 31 U.S.C. § 3729 *et seq.*, to participants in those programs. Notwithstanding this Court's admonition that the FCA "was not designed to reach every kind of fraud practiced on the Government," *United States v. McNinch*, 356 U.S. 595, 599 (1958), the Ninth Circuit has effectively transformed the statute into a general remedy for *any* knowing regulatory violation in connection with *any* federal benefit program—a result that contradicts this Court's teachings and the holdings of several other courts of appeals. The decision below exposes government contractors—including, for example, those in the education, health-care, and defense industries—to the specter of staggering liability and enormous settlement pressure based on FCA claims pursued by private plaintiffs without the supervision of the United States government.

In direct conflict with decisions from other circuits recognizing that a plaintiff seeking recovery under the FCA must allege either that the claimant made a false representation regarding a condition of payment or that the claimant promptly and substantially failed to comply with a promise made to obtain program eligibility, the Ninth Circuit held that *neither* a false statement pertaining to a condition of payment *nor* prompt and substantial noncompliance with a condition of eligibility need be alleged to state an FCA claim.

Under the Ninth Circuit's expansive construction of the FCA, any allegation that a claimant engaged in a knowing "course of conduct" that violated any condition for establishing eligibility to participate in a federal benefit program is sufficient to state a claim under the FCA. Pet. App. 13a. Contrary to the FCA's plain language, which prohibits the use of fraud to "get a . . . claim paid," rather than to obtain program eligibility, 31 U.S.C. § 3729(a)(2), this decision converts an alleged violation of any of the thousands of regulations that govern participation in federal benefit programs into a potential FCA claim, and displaces other statutory and regulatory regimes designed to redress regulatory noncompliance and acts of fraud against the federal government.

Certiorari is warranted to restore the reasonable limitations that Congress imposed on the scope of the FCA and to resolve the lower courts' uncertainty regarding the statute's parameters.

1. The FCA was enacted in 1863 in response to extensive acts of fraud that military contractors perpetrated upon the federal government during the Civil War. As amended, the statute currently provides the federal government with a remedy for the submission of "false or fraudulent claims" for payment. 31 U.S.C. § 3729(a)(1), (a)(2). An FCA action can be initiated either directly by the United States or by a private person—known as a "relator"—asserting a *qui tam* action against the alleged false claimant "in the name of the Government." *Id.* § 3730(b)(1). If an FCA action is commenced by a relator, the complaint must be filed under seal and delivered to the United States, which has 60 days to review the complaint and determine whether to intervene and assume primary responsibility for prosecuting the action. *Id.* § 3730(b)(2). If the United States declines to intervene, then the relator retains the exclusive right to pursue the FCA claim. *Id.* § 3730(b)(4).

A claimant found liable under the FCA is subject to a civil penalty of between $5,500 and $11,000 per claim, as well as treble damages. 31 U.S.C. § 3729(a); 28 C.F.R. § 85.3(a)(9). The relator is entitled to share in any recovery with the United States: if the United States does not intervene, the relator receives between 25 and 30 percent of the recovery; if the United States does intervene, then the relator's share is generally between 15 and 25 percent. 31 U.S.C. § 3730(d)(1)-(2).

The "archetypal" FCA action is premised on a claim for government payment that is expressly false—for example, an invoice submitted to the government for work that the claimant knows was never performed or was performed deficiently. *See, e.g., United States v. Bornstein*, 423 U.S. 303, 307 (1976). With only infrequent guidance from this Court, the lower federal courts have developed several other theories of FCA liability. Under the "false certification" theory, FCA liability may be predicated upon an express false certification of compliance with a statutory or regulatory requirement that is a condition of receiving a government benefit. *See, e.g., United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 902 (5th Cir. 1997). In "rare circumstances" (*United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1267 (9th Cir. 1996)), FCA liability may also be based on the so-called "promissory fraud" theory, which applies where a claimant uses fraud to obtain eligibility to participate in a government program—for example, by using a bid-rigging scheme to obtain a government contract. *See United States ex rel. Marcus v. Hess*, 317 U.S. 537, 543 (1943).

2. UOP is the largest private university in the United States. It currently enrolls more than 200,000 students at 76 campuses (including its online learning facilities) and 119 educational centers in 37 States. UOP's primary mission is to provide adults with the opportunity to continue their education and develop the skills essential to professional suc-

cess. Both the federal government—including the Army, Navy, Marines, and FBI—and a number of major corporations—including Boeing and Ford Motor Co.—recommend UOP to employees who are required, or who elect, to take continuing education classes, and reimburse employees for their UOP tuition.

UOP participates in the federal financial aid program established under Title IV of the Higher Education Act ("HEA"). UOP must adhere to an extensive set of statutory and regulatory requirements to maintain its eligibility to participate in the Title IV financial aid program—many of which have nothing to do with any claim for payment from the government. *See, e.g.*, 34 C.F.R. § 668.46(b) (requiring participating institutions to prepare an annual campus security report); *id.* § 668.47(c) (requiring institutions to prepare an annual report on athletic program participation). "In order to be an eligible institution for the purposes" of Title IV, UOP is also required to execute a multi-year Program Participation Agreement ("PPA") with the United States Department of Education. 20 U.S.C. § 1094(a). The PPA sets forth additional conditions for establishing eligibility to participate in the Title IV program and reiterates a number of the statutory and regulatory requirements that govern the program. *See id.* (the PPA "shall condition the initial and continuing eligibility of an institution to participate in a program upon compliance" with its terms).

In the PPA, UOP agrees, among other things, that it "will not provide . . . any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments." Pet. App. 34a; *see also* 20 U.S.C. § 1094(a)(20) (codifying this restriction); 34 C.F.R. § 668.14(b)(22)(ii)(A) (authorizing the payment of salaries to recruiters provided that salary adjustments are not "based *solely* on the number of students recruited, admitted, enrolled, or awarded financial aid") (emphasis added). If an institution violates this restriction on so-called "incentive

compensation," it may be liable for civil penalties of up to $27,500 per violation, 20 U.S.C. § 1094(c)(3)(B)(i); 34 C.F.R. § 668.84, temporarily lose its eligibility to participate in the Title IV program, *id.* § 668.85, or be terminated from the program altogether. *Id.* § 668.86.

3. Relators were employed as admissions counselors at UOP at the time they initiated this FCA suit. They alleged that UOP violated the restriction on incentive compensation by paying admissions counselors salaries based solely on the number of students they enrolled. Relators contended that, as a result of this alleged regulatory violation, the Title IV financial aid applications that UOP submitted on behalf of its students constituted "false claims" within the meaning of the FCA. Specifically, relators alleged that UOP falsely certified compliance with the restriction on incentive compensation when it signed the PPA. In the alternative, relators asserted that, even if the PPA did not constitute a "certification" for purposes of the false certification theory of FCA liability, UOP was liable under the promissory fraud theory because it allegedly entered into the PPA without ever intending to comply with the restriction on incentive compensation.

Relators filed their complaint under seal, and the United States declined to intervene. After the complaint was filed, the Department of Education began a program review of UOP's recruiting practices. That review culminated in a settlement agreement in which UOP did not admit any liability. The agreement did not require UOP to repay any of the financial aid received by its students, change any of its practices for compensating admissions counselors, or discipline any of its employees. This result is consistent with a Department of Education memorandum concluding, notably, that violations of the restriction on incentive compensation do not cause the government monetary loss and do not necessarily preclude an educational institution from participating in the Title IV HEA program. Pet. App. 52a.

4. UOP moved to dismiss the relators' complaint on the ground that they had failed to state a claim under either the false certification or promissory fraud theories of FCA liability. The district court granted UOP's motion to dismiss because it concluded that relators had "not identified any certification which is a prerequisite for UOP to receive federal funds." Pet. App. 22a.

The Ninth Circuit reversed. The court of appeals concluded that relators had stated a claim under the false certification theory because, according to the court, the certification requirement can be satisfied either through a "false statement" or through a "fraudulent *course of conduct*" that violates a statutory or regulatory requirement. Pet. App. 13a (emphasis added). Contending that there "is no reason to innoculate [sic] institutions of higher education from [FCA] liability when they *knowingly* violate a regulatory condition," *id.* at 14a, the court of appeals held that relators' false certification claim can proceed based on their allegation that UOP knowingly paid its admissions counselors enrollment-based salaries proscribed by the restriction on incentive compensation. *Id.* The court reached this conclusion even though it recognized that "compliance with the incentive compensation ban is a necessary condition of continued *eligibility* and *participation*" in the Title IV program, *id.* at 16a (emphases added), rather than an express condition of receiving and retaining financial aid payments under Title IV once threshold eligibility has been established. The court of appeals expressed concern that if this condition of eligibility were not deemed sufficient to support an FCA claim, UOP "would be virtually unfettered in its ability to receive funds from the government while flouting the law." *Id.* at 17a.

The Ninth Circuit further concluded that relators had stated a claim under the promissory fraud theory of FCA liability. According to the court of appeals, to survive a motion to dismiss a promissory fraud claim, a complaint need allege only a "false or fraudulent course of conduct, made

with scienter" (Pet. App. 13a), and, here, relators had adequately alleged that UOP never intended to comply with its representation in the PPA that it would adhere to the restriction on incentive compensation. *Id.* at 14a.

REASONS FOR GRANTING THE PETITION

This Court has only infrequently provided the lower courts with authoritative guidance regarding the scope of the FCA. Indeed, the false certification and promissory fraud theories of FCA liability, upon which the decision below rests, were developed by the lower federal courts without any meaningful instruction from this Court. As a result, the circuits are now sharply divided regarding the elements necessary to state a claim under these theories of FCA liability. The Ninth Circuit's expansive reading of the FCA—which essentially transforms the statute into a general remedy for any knowing violation of a federal program's regulatory requirements—exacerbates this circuit split and directly conflicts in a number of significant respects with other circuits' narrower interpretations of the FCA. This Court's review is warranted to reconcile these sharply divergent readings of the FCA and to ensure that—consistent with this Court's teachings—litigants and lower courts do not distort the statute in an effort "to reach every kind of fraud practiced on the Government." *United States v. McNinch*, 356 U.S. 595, 599 (1958).

The circuits are starkly divided on the question whether a false certification claim under the FCA can be premised on fraud in connection with a threshold condition of program eligibility or must instead be based upon fraud that relates to a condition of receiving payment from the government. The Ninth Circuit's holding that relators can proceed on their false certification claim based simply on UOP's alleged fraudulent violations of the restriction on incentive compensation—a condition to which UOP must adhere to establish eligibility to participate in the Title IV financial aid pro-

gram—cannot be reconciled with decisions from the Second, Fourth, and Fifth Circuits holding that an allegation of fraud in connection with a condition of payment is a prerequisite to a false certification claim.

The Ninth Circuit's expansive reading of the FCA disregards the statute's plain language, which is directed toward fraud used to "get a . . . claim paid," rather than to obtain program eligibility. 31 U.S.C. § 3729(a)(2). As the Second Circuit has explained, and this statutory language confirms, the "False Claims Act was not designed for use as a blunt instrument to enforce compliance with all . . . regulations—but rather only those regulations that are a precondition to payment." *Mikes v. Straus*, 274 F.3d 687, 699 (2d Cir. 2001). Moreover, by extending the FCA to encompass fraudulent conduct in connection with any of the extensive regulations that typically govern participation in federal benefit programs, the Ninth Circuit's decision renders superfluous other statutory and regulatory regimes that address fraudulent activity in specific federal programs. As a result, contractors that do business with the federal government are now confronted with the alarming prospect of potentially bankrupting FCA liability premised on allegations of fraud pertaining to obscure regulatory and contractual provisions unrelated to their right to receive payment from the government. *See, e.g.*, 34 C.F.R. §§ 668.46(b), 668.47(c) (requiring institutions participating in the Title IV program to prepare annual campus security and athletic program participation reports); Pet. App. 45a (requiring institutions to operate a drug abuse prevention program). To avoid the possible assessment of civil penalties of up to $11,000 per claim, as well as treble damages, defendants will face intense pressure to settle even the flimsiest of these false certification claims.

The need for this Court's review is compounded by the Ninth Circuit's holding that an alleged fraudulent "course of conduct" is sufficient to state a false certification claim—a conclusion that conflicts with decisions from the Second and

Third Circuits holding that a false representation is required—and by its rejection of the stringent pleading requirements that other circuits have imposed on promissory fraud claims under the FCA. These features of the Ninth Circuit's decision further extend the FCA into areas of conduct that are properly within the ambit of other statutory and regulatory regimes, and increase the likelihood that government contractors will be compelled to pay extortionate settlements to relators pursuing FCA claims that Congress never intended to authorize.

It is well-established that "enormous potential liability, which turns on a question of federal statutory interpretation, is a strong factor in deciding whether to grant certiorari." *Fid. Fed. Bank & Trust v. Kehoe*, 126 S. Ct. 1612, 1612 (2006) (Scalia, J., concurring in denial of certiorari). Because the question presented by this case has profound financial ramifications for *all* entities that contract with, or receive funds from, the federal government, the petition for a writ of certiorari should be granted.

I. THE DECISION BELOW CONFLICTS WITH DECISIONS FROM THE SECOND, FOURTH, AND FIFTH CIRCUITS HOLDING THAT FRAUD IN CONNECTION WITH A CONDITION OF PAYMENT IS A PREREQUISITE TO A FALSE CERTIFICATION CLAIM.

This Court has never considered the parameters of the false certification theory of FCA liability. As a result, a sharp disagreement has emerged among the circuits regarding whether a false certification claim must be premised on fraud that pertains to a condition of receiving payment from the government, or whether it is sufficient to plead fraud in connection with a condition for establishing threshold eligibility to participate in a federal program. The Ninth Circuit's rejection of the legal distinction between conditions of pay-

ment and conditions of eligibility conflicts with decisions from *three* other circuits.

1. The Ninth Circuit held below that the restriction on incentive compensation could serve as the basis for a false certification claim, even though the statutes and regulations governing the Title IV program confirm that compliance with the restriction is a threshold condition of eligibility to participate in the Title IV program, rather than a condition of payment. *See* 20 U.S.C. § 1094(a) (listing the restriction on incentive compensation as a "condition" to the "initial and continuing eligibility of an institution to participate in a program" under Title IV of the HEA); 34 C.F.R. § 668.14(a)(1) ("initial and continued participation" in the Title IV program is "condition[ed]" on the requirements set forth in the PPA). The Ninth Circuit opined that separating conditions of threshold eligibility from conditions of payment "is a distinction without a difference." Pet. App. 16a.

The Seventh Circuit reached a similar conclusion in *United States ex rel. Main v. Oakland City University*, 426 F.3d 914 (7th Cir. 2005), *cert. denied*, 126 S. Ct. 1786 (2006), where the court explicitly rejected the distinction between conditions of eligibility and conditions of payment in the Title IV context and reinstated an FCA promissory fraud claim premised on alleged violations of the restriction on incentive compensation. *Id.* at 916. In explaining its refusal to recognize a legally meaningful difference between threshold conditions of program eligibility and those conditions on which payment is expressly conditioned, the Seventh Circuit asserted that, as long as "a false statement is integral to a causal chain leading to payment, it is irrelevant how the federal bureaucracy has apportioned the statements among layers of paperwork." *Id.*

These cases directly conflict with decisions from the Second, Fourth, and Fifth Circuits holding that, in order to state a claim under the false certification theory of FCA li-

ability, a plaintiff must allege that the claimant falsely certified compliance with a requirement that is a condition of receiving payment from the federal government.

In *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776 (4th Cir. 1999), for example, the Fourth Circuit rejected a false certification claim that alleged that the defendant fraudulently failed to disclose conflicts of interest that purportedly arose after it entered into a government contract that required it to certify the absence of conflicts. *Id.* at 793. The court concluded that the conflict certification was merely a threshold requirement for demonstrating contracting eligibility and that such certifications were not "in any way related to, let alone prerequisites for, receiving continued funding." *Id.*

Similarly, in *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, the Fifth Circuit remanded a false certification case for further proceedings where it was "unable to determine from the record" whether the federal government's reimbursement of Medicare services was "conditioned on defendants' certifications of compliance" with health-care laws, which were submitted as part of the annual cost reports that the defendants filed with the federal government. 125 F.3d at 902, 903. The defendants argued that they could not be held liable under the false certification theory because the certification was a condition of establishing continuing eligibility to participate in the Medicare program, rather than a condition of receiving payments. Agreeing with the defendants that a false certification claim could not be premised on a condition of program eligibility, the Fifth Circuit directed the district court to determine on remand whether the requirement in question was indeed a con-

dition of eligibility or whether it was a condition of payment adequate to sustain a false certification claim. *Id.* at 903.[1]

Moreover, in a case factually and legally indistinguishable from the decision below, the Fifth Circuit relied upon the distinction between conditions of eligibility and conditions of payment to dismiss an FCA claim premised on an educational institution's alleged failure to comply with the same restriction on incentive compensation at issue here. In *United States ex rel. Graves v. ITT Educational Services, Inc.*, 284 F. Supp. 2d 487 (S.D. Tex. 2003), *aff'd*, 111 F. App'x 296 (5th Cir. 2004), the district court explained that there is "a distinction between generally certifying compliance with applicable regulations and statutes governing *participation* in a program"—which it deemed insufficient to support a false certification claim—and "certifying compliance with a particular requirement that is a prerequisite to receiving or retaining *payment* under that program"—which the court deemed an appropriate basis for proceeding under the false certification theory. *Id.* at 501 (emphases added). Because Title IV of the HEA "do[es] not expressly condition payment or retention of the student loans . . . on the submission of certification of compliance with" the restriction on incentive compensation, the district court concluded that the restriction is merely "a condition of eligibility to participate in the program, not an express condition of payment of specific claims," and that the restriction thus could not support

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[1] On remand, the district court described its task as "determin[ing] whether the government's payments for the services identified in those annual cost reports were conditioned on the truthfulness of [the] certifications" included in those reports. *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 20 F. Supp. 2d 1017, 1020 (S.D. Tex. 1998). The district court concluded that the relator had stated a valid false certification claim because he "provided evidence . . . that [the federal government] relied on the certifications in determining the issues of *payment* and *retention of payment* as well as continued eligibility for participation in the Medicare program." *Id.* at 1046 (emphases added).

the relators' false certification cause of action. *Id.* at 502. The Fifth Circuit affirmed the dismissal "essentially for the reasons stated in" the district court's opinion. *United States ex rel. Graves v. ITT Educ. Servs., Inc.*, 111 F. App'x 296, 297 (5th Cir. 2004), *cert. denied*, 544 U.S. 978 (2005); *see also United States ex rel. Gay v. Lincoln Technical Inst., Inc.*, 111 F. App'x 286 (5th Cir. 2004) (affirming the dismissal of a false certification claim that alleged violations of the restriction on incentive compensation, where the district court had concluded that the defendant did not make a false certification of compliance on which payment was conditioned), *aff'g* 2003 U.S. Dist. LEXIS 25968 (N.D. Tex. Sept. 3, 2003). *Graves* therefore bars a litigant in the Fifth Circuit from bringing an FCA claim that, under the decision below, would be viable in the Ninth Circuit.

The Second Circuit has also recognized the legal significance of the distinction between conditions of payment and threshold eligibility conditions. In *Mikes v. Straus*, 274 F.3d 687 (2d Cir. 2001), the court dismissed an FCA claim that was premised upon the defendants' certification of compliance with a condition of eligibility to participate in the Medicare program, while recognizing that the relator could have pled a valid FCA claim based upon a certification of compliance with a requirement that was a condition of receiving Medicare payments. *Id.* at 702. The court explained that "[s]ince the [FCA] is restitutionary and aimed at retrieving ill-begotten funds, it would be anomalous to find liability when the alleged noncompliance would not have influenced the government's decision to pay" and that the false certification theory can therefore be applied only "where a party certifies compliance with a statute or regulation as a condition to governmental payment." *Id.* at 697. The court concluded that a false certification claim could be predicated upon a Medicare form that required the claimant to certify that "the services shown . . . were medically indicated and necessary" and that provided that "[n]o . . . Medicare benefits *may be*

paid unless this form is received," because, the court explained, "compliance [with the terms on the form] was a precondition of governmental payment." *Id.* at 698 (emphasis added; internal quotation marks omitted).

The relators in *Mikes* also sought to premise a false certification claim upon the defendants' alleged violation of a regulation establishing standards of care for Medicare providers. The Second Circuit dismissed that claim, however, because the standard-of-care provision did not "explicitly condition payment upon compliance," but rather set forth eligibility requirements for Medicare participation. 274 F.3d at 701. The court reasoned that the "False Claims Act was not designed for use as a blunt instrument to enforce compliance with all medical regulations—but rather only those regulations that are a precondition to payment." *Id.* at 699.

2. This Court's review is warranted to resolve the circuits' pervasive disagreement on the question whether an FCA false certification claim can be premised upon a violation of a threshold condition of program eligibility or must instead be predicated on a condition of payment. In the absence of this Court's authoritative construction of the FCA, the tens of thousands of businesses that regularly contract with the federal government—including those in the education, health-care, and defense industries—will be confronted with substantial uncertainty regarding the parameters of the FCA and the extent of the liability risk to which they may be exposed under its provisions.

Moreover, the Ninth Circuit's holding that a false certification claim can be premised on alleged noncompliance with a threshold condition of program eligibility is deeply flawed as a legal matter—a fact that compounds the urgent need for this Court's review. This Court has long recognized (*McNinch*, 356 U.S. at 599), and the Second Circuit has recently reiterated, that "not all instances of regulatory noncompliance will cause a claim to become false" for purposes

of the FCA. *Mikes*, 274 F.3d at 697. The FCA's scope is circumscribed by its statutory language, which proscribes the use of a "false . . . statement to get a false or fraudulent claim *paid* or *approved* by the Government," 31 U.S.C. § 3729(a)(2) (emphases added), not the use of a false statement to obtain eligibility to participate in a government benefit program. Although false statements at the eligibility stage may be prohibited by federal law, *see, e.g.*, 18 U.S.C. § 1001, they do not fall within the ambit of the FCA's plain language and its peculiar enforcement mechanisms. Indeed, contrary to the Ninth Circuit's concern that recognizing the distinction between conditions of eligibility and conditions of payment would afford government contractors free rein to "flout" the law, Pet. App. 16a, the FCA is supplemented by numerous specific provisions that provide a remedy for fraudulent conduct by government contractors, including in the Title IV context. *See, e.g.*, 20 U.S.C. § 1094(c)(3)(B)(i) (providing for a civil penalty of up to $27,500 for each violation of a Title IV requirement); 41 C.F.R. § 105-68.800(b)(3) (providing for the debarment from future contracting opportunities of a federal contractor that is in "willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction"). Significantly, these remedies, unlike the FCA, are subject to the federal government's direct and exclusive control.

The Ninth Circuit's refusal to distinguish between conditions of eligibility and conditions of payment for purposes of FCA liability will compel educational institutions to defend themselves against potentially devastating FCA liability based upon noncompliance with any of the extensive regulations that govern participation in the federal financial aid program. Indeed, the PPA to which institutions must agree in order to establish eligibility to participate in the Title IV program sets forth pages of detailed regulatory requirements, ranging from the operation of a drug-abuse prevention program to limitations on the use of job-placement statistics.

Pet. App. 27a-46a. Hundreds of additional requirements are found in the pages of the Code of Federal Regulations. 34 C.F.R. pt. 668; *see, e.g.*, *id.* § 668.24 (establishing record retention requirements for participating institutions, including the number of years that financial aid paperwork must be retained); *id.* § 668.25 (imposing restrictions on an institution's contracts with third parties to administer the Title IV program); *id.* § 668.45(a)(5) (requiring an institution to publish its graduation statistics annually by July 1).

The financial implications of the Ninth Circuit's expansive notion of FCA liability are staggering. Relators contend that, because UOP is purportedly ineligible to participate in the Title IV financial aid program due to its alleged violation of the restriction on incentive compensation, each financial aid application submitted by the school or its students constitutes a separate false claim. If relators prevail, UOP may potentially be liable for a civil penalty of between $5,500 and $11,000 for each of the hundreds of thousands of financial aid applications submitted on behalf of UOP students in the years preceding the initiation of relators' suit—the civil penalty alone could total well more than a *billion* dollars. 31 U.S.C. § 3729(a); 28 C.F.R. § 85.3(a)(9).[2] This amount would be augmented by a treble damages assessment, which relators allege the district court should calculate based upon the billions of dollars in financial aid payments that UOP received in the years preceding this suit. UOP faces this risk of overwhelming liability even though it is undisputed that each

[2] Unlike the civil penalty provision of the HEA, which provides for a $27,500 penalty per statutory or regulatory *violation*, 20 U.S.C. § 1094(c)(3)(B)(i); 34 C.F.R. § 668.84, the FCA provides for a fine of between $5,500 and $11,000 for each false or fraudulent *claim* submitted to the federal government. 31 U.S.C. § 3729(a); 28 C.F.R. § 85.3(a)(9). Under the Ninth Circuit's reasoning, a single statutory or regulatory violation—subject to a $27,500 fine under the HEA—arguably could give rise to thousands of false or fraudulent claims and a multimillion-dollar penalty under the FCA.

financial aid application it submitted to the federal government was completely accurate and truthful.

Confronted with this alarming prospect, UOP and other FCA defendants with viable factual defenses against the alleged statutory or regulatory violations of which they stand accused will nevertheless be under tremendous pressure to settle. The Ninth Circuit's broad reading of the FCA thus effectively transforms the FCA from a means of remedying fraud against the federal government into a mechanism for extorting settlements from defendants unable to sustain the severe risks of going to trial. The inevitable result will be a proliferation of meritless but financially successful suits, simultaneously causing higher tuition rates for students, denying funds for classroom resources and student services, and producing undeserved financial windfalls for relators—and their counsel. Indeed, the Ninth Circuit's decision has profound ramifications not only for proprietary institutions like UOP, but also for traditional, not-for-profit higher education institutions. *See United States v. Chapman Univ.*, 2006 WL 1562231, at *3 (C.D. Cal. May 23, 2006) (denying a motion to dismiss an FCA claim that alleged that a traditional, not-for-profit university had falsely certified its eligibility to participate in the federal financial aid program by knowingly failing to provide the number of classroom hours mandated by a private accrediting association). And, outside of the education context, the notion that FCA false certification claims can be premised on threshold eligibility conditions has equally far-reaching consequences for health-care providers, defense contractors, and other industries that frequently conduct business with the federal government pursuant to highly detailed regulatory and contractual regimes.

The significant financial repercussions of the Ninth Circuit's expansive (and patently erroneous) interpretation of the FCA—together with the circuit split exacerbated by the Ninth Circuit's decision—make this case eminently worthy of this Court's consideration.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS FROM THE SECOND AND THIRD CIRCUITS HOLDING THAT A FALSE REPRESENTATION IS A PREREQUISITE TO A FALSE CERTIFICATION CLAIM.

The extensive disagreement among the circuits regarding the viability of an FCA false certification claim premised on a violation of a condition of program eligibility is a sufficient reason, in and of itself, for this Court to grant certiorari. The pressing need for this Court's review is reinforced by the fact that the Ninth Circuit's reading of the FCA conflicts with other circuits' decisions in several other significant respects. For example, the circuits are sharply divided over whether a false representation of compliance is necessary to state a false certification claim or whether a knowing course of conduct that violates a statutory, regulatory, or contractual condition is sufficient. This case provides the Court with the opportunity to resolve this additional area of uncertainty surrounding the FCA.

1. The Second and Third Circuits have both held that an explicit representation of compliance with a statutory or regulatory requirement on which payment is conditioned is an essential element of a false certification claim under the FCA. As the Second Circuit explained in *Mikes v. Straus*, "the 'certification theory' of liability . . . is predicated upon a false *representation* of compliance with a federal statute or regulation" on which payment of a claim is conditioned. 274 F.3d at 696 (emphasis added). The court concluded that the representation requirement was satisfied by a Medicare reimbursement form that required the claimant to certify that the services for which reimbursement was being sought were "medically indicated and necessary." *Id.* at 698.

In *United States ex rel. Quinn v. OmniCare Inc.*, 382 F.3d 432 (3d Cir. 2004), the Third Circuit similarly emphasized that the "'certification theory' of FCA liability is based

on a false representation of compliance with a contract term, statute, or regulation." *Id.* at 441. The court determined that this requirement was met by a reimbursement form that required a claimant to certify that the services in question were rendered "in accordance with . . . [Medicaid] regulations." *Id.* (alterations in original; internal quotation marks omitted); *see also United States v. Southland Mgmt. Corp.*, 326 F.3d 669, 679 (5th Cir. 2003) (en banc) (Jones, J., concurring) ("a false certification must be a 'false *statement*' made 'to get' a false claim paid") (emphasis added).

In direct conflict with the requirements for stating a false certification claim in the Second and Third Circuits—but in accord with a decision from the Fourth Circuit—the Ninth Circuit held below that a "fraudulent course of conduct" is sufficient to state a false certification claim. Pet. App. 13a; *see also Harrison*, 176 F.3d at 788 ("The test for False Claims Act liability . . . is . . . whether there was a false statement or fraudulent course of conduct . . . that caused the government to pay out money"). The Ninth Circuit concluded that relators had therefore pled a viable FCA claim under the false certification theory because they alleged that UOP knowingly violated the restriction on incentive compensation by paying its admissions counselors enrollment-based compensation. Pet. App. 14a. This holding is directly at odds with the Second and Third Circuits' conclusion that a "false representation" of statutory or regulatory compliance—rather than a mere course of conduct—is a necessary element of a false certification claim.

2. This Court should grant certiorari to address this additional area of lower-court disagreement regarding the FCA and to reject the far-reaching and erroneous conclusion that an alleged fraudulent course of conduct suffices to state a false certification claim. Under the Ninth Circuit's broad reading of the FCA, *any* knowing violation of the extensive regulatory provisions that govern participation in a federal benefit program is adequate to state an FCA claim, entitles a

relator to discovery, and can culminate in FCA liability. Indeed, there are 162 pages of regulations that govern participation in the Title IV HEA program (34 C.F.R. pt. 668)—in the Ninth Circuit, a knowing violation of any of these provisions is sufficient to state a claim under the FCA.

As with the Ninth Circuit's conclusion that a false certification claim can be premised on a condition of program eligibility, this holding represents a radical extension of the FCA's scope that—contrary to Congress's intentions and this Court's teachings—transforms the statute into a remedy for virtually all fraudulent conduct against the federal government and displaces other remedial measures designed to encompass such fraudulent activities. Indeed, as the Ninth Circuit itself recognized in a case that it overruled *sub silentio* in the decision below, "There are administrative and other remedies for regulatory violations. . . . However, absent actionable false certifications upon which funding is conditioned, the False Claims Act does not provide such a remedy." *Hopper*, 91 F.3d at 1267. The statutes and regulations governing the Title IV program provide a number of remedial mechanisms for addressing fraudulent violations of the restriction on incentive compensation. *See, e.g.*, 20 U.S.C. § 1094(c)(3)(B)(i). Reliance upon the "blunt instrument" of the FCA to remedy fraudulent conduct in connection with the Title IV program is not only wholly unnecessary (*Mikes*, 274 F.3d at 699), but also potentially disruptive of the carefully calibrated remedial regime established by Congress and the Department of Education.

Moreover, if left undisturbed, the decision below could be read as eviscerating the distinction between the widely accepted express false certification theory and the often-criticized implied false certification theory—an expansive approach to FCA liability, adopted by several circuits, that is premised on the notion that a claimant impliedly certifies its eligibility to receive payment whenever it submits a claim for payment to the government. *Compare Shaw v. AAA Eng'g &*

Drafting, Inc., 213 F.3d 519, 532 (10th Cir. 2000) (recognizing an FCA cause of action based on "implied" certification of statutory or regulatory compliance), *with Harrison*, 176 F.3d at 786 n.8 (labeling the implied certification theory "questionable"). Although the Ninth Circuit purported not to resolve the viability of the implied false certification theory (Pet. App. 9a n.1), its rejection of the false representation requirement effectively nullified the distinction between the express and implied theories of false certification. If a false representation is no longer an element of an express false certification claim, and a "course of conduct" can constitute the requisite certification, then any distinction between the express and implied theories of liability is meaningless.

III. The Decision Below Conflicts With Decisions From The Fifth And D.C. Circuits Imposing A Strict Pleading Threshold On Promissory Fraud Claims.

The Ninth Circuit's decision also dramatically lowers the threshold for pleading a promissory fraud claim under the FCA, in direct conflict with the stringent pleading requirements endorsed by at least two other circuits.

Promissory fraud may be actionable under the FCA where a claimant uses fraud to obtain eligibility to participate in a government benefit program. Although the origins of this theory of liability are generally traced to this Court's decision in *United States ex rel. Marcus v. Hess*—which held that a defendant's use of an illegal bid-rigging scheme to obtain a government contract rendered its ensuing claims for payment fraudulent for purposes of the FCA (317 U.S. at 543)—the lower federal courts have expanded the contours of the promissory fraud theory beyond the fact pattern in that case, where the bid-rigging scheme was the proximate cause of the claimant's eligibility to receive payment from the government, to cases in which the connection between the initial act of fraud and the claim for payment is significantly more

attenuated. The Seventh Circuit has held, for example, that whenever a defendant secures the right to participate in a federal benefit program by promising to comply with the program's eligibility requirements, without actually intending to comply with those requirements and in fact failing to do so, then the defendant may be liable for promissory fraud under the FCA. *See Main*, 426 F.3d at 916 (holding that a relator had stated a promissory fraud claim by alleging that an educational institution lied about its intention to comply with the restriction on incentive compensation).

This Court, of course, has never sanctioned such a boundless definition of promissory fraud, and a number of courts have attempted to cabin the theory's reach by imposing exacting pleading requirements on relators asserting such claims. In the Fifth and D.C. Circuits, a naked allegation that the defendant violated a program's regulatory requirements is insufficient to support an inference that the defendant lied about its intention to comply with those requirements and thus to state a claim under the promissory fraud theory. As the D.C. Circuit has explained, "there is no inference of fraudulent intent not to perform from the mere fact that a promise made is subsequently not performed." *United States ex rel. Bettis v. Odebrecht Contractors of Cal., Inc.*, 393 F.3d 1321, 1329-30 (D.C. Cir. 2005) (internal quotation marks omitted); *see also United States ex rel. Willard v. Humana Health Plan of Tex. Inc.*, 336 F.3d 375, 386 (5th Cir. 2003) (same). To survive a motion to dismiss a promissory fraud claim in the Fifth and D.C. Circuits the relator must instead allege "that the defendant *promptly* followed through on its intent not to perform by *substantially* failing to carry out its obligations under the contract." *Willard*, 336 F.3d at 386 (emphases added); *see also Bettis*, 393 F.3d at 1330 (affirming a grant of summary judgment in favor of the defendant on a promissory fraud claim because there was no evidence that the defendant had repudiated the contract quickly after entering into it).

In conflict with the pleading requirements recognized in the Fifth and D.C. Circuits, the Ninth Circuit below relied exclusively upon relators' allegation of UOP's noncompliance with the restriction on incentive compensation to support the inference that UOP knowingly lied when it agreed in the PPA to comply with that restriction. Pet. App. 14a. The court did not require relators to allege—as they would have been required to do in the Fifth and D.C. Circuits—facts that, if proven, would have established that immediately after entering into the PPA, UOP substantially failed to comply with the restriction on incentive compensation by paying its admissions counselors incentive compensation based solely on enrollments.

The relaxed standard for pleading promissory fraud endorsed by the Ninth Circuit virtually guarantees that a claim will survive a motion to dismiss and that the defendant will face significant pressure to settle even the most dubious of promissory fraud claims. Coupled with the Ninth Circuit's vast extension of the false certification theory of FCA liability, the Ninth Circuit's unwillingness to police the bounds of the promissory fraud theory essentially transmutes the FCA into a remedy for "every kind of fraud practiced on the Government" (*McNinch*, 356 U.S. at 599)—in direct conflict with the contrary holdings of this Court and other circuits. This Court's review is warranted to resolve these conflicts and to ensure that government contractors are not saddled with the prospect of potentially bankrupting FCA liability based on alleged conduct that Congress intended to regulate under more nuanced—and less punitive—statutory and regulatory regimes.

CONCLUSION

In light of the circuits' profound disagreement regarding the scope of the FCA, and the significant impact of the FCA on everyone who contracts with the federal government, there is an urgent need for this Court to grant review and

clarify the statute's parameters. Without this Court's intervention, a litigant could bring an FCA false certification claim premised on the violation of any program eligibility requirement in the Seventh and Ninth Circuits, but would be barred from doing so in the Second, Fourth, and Fifth Circuits, where such claims are limited to requirements on which government payment is conditioned. Similarly, in the Fourth and Ninth Circuits, a litigant could base a false certification claim on any knowing "course of conduct" that violates a regulatory requirement, but would be restricted to false representations of regulatory compliance in the Second and Third Circuits. The decision below exacerbates this unacceptable conflict, and, if left uncorrected, will risk exposing government contractors to potentially bankrupting liability on the basis of obscure regulatory violations that Congress never intended to fall within the peculiar enforcement mechanism of the FCA.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

APPENDIX A

UNITED STATES of America, ex rel. Mary HENDOW; Julie Albertson, Plaintiffs–Appellants,

v.

UNIVERSITY OF PHOENIX, Defendant–Appellee.

No. 04-16247.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Feb. 15, 2006.

Filed Sept. 5, 2006.

Nancy G. Krop, Law Offices of Nancy G. Krop, Redwood City, CA and Daniel Robert Bartley, Law Offices of Daniel Robert Bartley, Counsel for the plaintiffs-appellants.

Timothy J. Hatch, Gibson, Dunn & Crutcher LLP, Los Angeles, CA, for the defendant-appellee.

Charles W. Scarborough, Department of Justice, Civil Division, Washington, DC, for the amicus.

Appeal from the United States District Court for the Eastern District of California; Garland E. Burrell, District Judge, Presiding. D.C. No. CV-03-00457-GEB.

Before: HALL, SILVERMAN, and GRABER, Circuit Judges.

HALL, Senior Circuit Judge:

The False Claims Act makes liable anyone who "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government." 31 U.S.C. § 3729(a)(2). In this case, relators have raised allegations that the University of Phoenix knowingly made false statements, and caused false statements to be made, that resulted in the payment by the federal Department of Education of hundreds of millions of dollars. Despite this axiomatic fit between the operative statute and the allegations made, respondent claims that relators' legal theory holds no water. The district court agreed, dismissing the suit for failure to state a claim upon which relief can be granted. We reverse.

I.

When an educational institution wishes to receive federal subsidies under Title IV and the Higher Education Act, it must enter into a Program Participation Agreement with the Department of Education (DOE), in which it agrees to abide by a panoply of statutory, regulatory, and contractual requirements. One of these requirements is a ban on incentive compensation: a ban on the institution's paying recruiters on a per-student basis. The ban prohibits schools from "provid[ing] any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any persons or entities engaged in any student recruiting or admission activities or in making decisions regarding the award of student financial assistance." 20 U.S.C. § 1094(a)(20). This requirement is meant to curb the risk that recruiters will "sign up poorly qualified students who will derive little benefit from the subsidy and may be unable or unwilling to repay federally guaranteed loans." *United States ex rel. Main v. Oakland City Univ.*, 426 F.3d 914, 916 (7th Cir. 2005), *cert. denied*, — U.S. —, 126 S.Ct. 1786, 164 L.Ed.2d 519 (2006). The ban was enacted based on evidence of serious program abuses. *See* S.Rep. No. 102-58, at 8 (1991) ("Abuses in Federal Student

Aid Programs") (noting testimony "that contests were held whereby sales representatives earned incentive awards for enrolling the highest number of student[s] for a given period"); H.R.Rep. No. 102-447, at 10, *reprinted in* 1992 U.S.C.C.A.N. 334, 343 (noting that the "new provisions include prohibiting the use of commissioned sales persons and recruiters").

This case involves allegations under the False Claims Act that the University of Phoenix (the University) knowingly made false promises to comply with the incentive compensation ban in order to become eligible to receive Title IV funds. Appellants, Mary Hendow and Julie Albertson (relators), two former enrollment counselors at the University, allege that the University falsely certifies each year that it is in compliance with the incentive compensation ban while intentionally and knowingly violating that requirement. Relators allege that these false representations, coupled with later claims for payment of Title IV funds, constitute false claims under 31 U.S.C. § 3729(a)(1) & (a)(2).

First, relators allege that the University, with full knowledge, flagrantly violates the incentive compensation ban. They claim that the University "compensates enrollment counselors . . . based directly upon enrollment activities," ranking counselors according to their number of enrollments and giving the highest-ranking counselors not only higher salaries but also benefits, incentives, and gifts. Relators allege that the University also "urges enrollment counselors to enroll students without reviewing their transcripts to determine their academic qualifications to attend the university," thus encouraging counselors to enroll students based on numbers alone. Relator Albertson, in particular, alleges that she was given a specific target number of students to recruit, and that upon reaching that benchmark her salary increased by more than $50,000. Relator Hendow specifically alleges that she won trips and home electronics as a result of enrolling large numbers of students.

Second, relators allege considerable fraud on the part of the University to mask its violation of the incentive compensation ban. They claim that the University's head of enrollment openly brags that "[i]t's all about the numbers. It will always be about the numbers. But we need to show the Department of Education what they want to see." To deceive the DOE, relators allege, the University creates two separate employment files for its enrollment counselors—one "real" file containing performance reviews based on improper quantitative factors, and one "fake" file containing performance reviews based on legitimate qualitative factors. The fake file is what the DOE allegedly sees. Relators further allege a series of University policy changes deliberately designed to obscure the fact that enrollment counselors are compensated on a per-student basis, such as altering pay scales to make it less obvious that they are adjusted based on the number of students enrolled.

Third and finally, relators allege that the University submits false claims to the government. Claims for payment of Title IV funds can be made in a number of ways, once a school signs its Program Participation Agreement and thus becomes eligible. For instance, in the Pell Grant context, students submit funding requests directly (or with school assistance) to the DOE. In contrast, under the Federal Family Education Loan Program, which includes Stafford Loans, students and schools jointly submit an application to a private lender on behalf of the student, and a guaranty agency makes the eventual claim for payment to the United States only in the event of default. Relators allege that the University submits false claims in both of these ways. They claim that the University, with full knowledge that it is ineligible for Pell Grant funds because of its violation of the incentive compensation ban, submits requests for those funds directly to the DOE, resulting in a direct transfer of the funds into a University account. They further claim that the University, again with knowledge that it has intentionally violated the incentive

compensation ban, submits requests to private lenders for government-insured loans.

On May 20, 2004, the district court dismissed the relators' complaint with prejudice under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. Relators appealed on June 15, 2004. The United States Department of Justice submitted a brief as amicus curiae supporting the reversal of the district court. Because this case comes to us on a motion to dismiss, we assume that the facts as alleged are true, and examine only whether relators' allegations support a cause of action under the False Claims Act under either of two possible theories. *See Zimmerman v. City of Oakland*, 255 F.3d 734, 737 (9th Cir. 2001) ("We review dismissals under Rule 12(b)(6) *de novo*, accepting as true all well-pleaded allegations of fact in the complaint and construing them in the light most favorable to the plaintiffs."). We hold that they do, and that either theory is viable.

II.

The district court below rejected both of relators' theories for why they have validly alleged that the University submitted false or fraudulent claims to the government in violation of the False Claims Act. First, the court rejected relators' claim under the "false certification" theory, as treated by this court in *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1266 (9th Cir. 1996), because the operative statute here "only requires that [the University] enter into an agreement, and does not require a certification." Second, the district court rejected relators' claim under the "promissory fraud" theory, because they did not "identif[y] any certification which is a prerequisite for [the University] to receive federal funds." These rulings conflated the proper analysis of False Claims Act liability, and so we will discuss the relevant theories in more detail.

In an archetypal *qui tam* False Claims action, such as where a private company overcharges under a government

contract, the claim for payment is itself literally false or fraudulent. *See Anton*, 91 F.3d at 1266. The False Claims Act, however, is not limited to such facially false or fraudulent claims for payment. *See id.* Rather, the False Claims Act is "intended to reach all types of fraud, without qualification, that might result in financial loss to the Government." *United States v. Neifert-White Co.*, 390 U.S. 228, 232, 88 S.Ct. 959, 19 L.Ed.2d 1061 (1968). More specifically, in amending the False Claims Act in 1986, Congress emphasized that the scope of false or fraudulent claims should be broadly construed:

> [E]ach and every claim submitted under a contract, loan guarantee, or other agreement which was originally obtained by means of false statements or other corrupt or fraudulent conduct, or in violation of any statute or applicable regulation, constitutes a false claim.

S.Rep. No. 99-345, at 9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5274.

The principles embodied in this broad construction of a "false or fraudulent claim" have given rise to two doctrines that attach potential False Claims Act liability to claims for payment that are not explicitly and/or independently false: (1) false certification (either express or implied); and (2) promissory fraud. *See Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th Cir. 1999).

A. False Certification

Many different courts have held that a claim under the False Claims Act can be false where a party merely falsely certifies compliance with a statute or regulation as a condition to government payment. *See, e.g., id.* at 786; *Mikes v. Straus*, 274 F.3d 687, 697-700 (2d Cir. 2001); *United States ex rel. Quinn v. Omnicare Inc.*, 382 F.3d 432, 441 (3d Cir. 2004). The leading case on false certification in the Ninth Circuit is *United States ex rel. Hopper v. Anton.*

In *Anton*, a relator-plaintiff brought a False Claims Act suit against the Los Angeles Unified School District (LAUSD) for allegedly submitting false claims for federal funds while in knowing violation of an underlying statute granting funds for special education programs (the Individuals with Disabilities Education Act, "IDEA"). 91 F.3d at 1263. In particular, the relator alleged that LAUSD's method of evaluating potential student eligibility for the program violated the IDEA. *Id.* LAUSD allegedly (1) submitted forms stating the number of eligible students in the district; (2) cashed checks that were partially comprised of federal funds; and (3) submitted triennial certifications averring that LAUSD "'will meet all applicable requirements of state and federal law and regulations,' including 'general compliance' with the IDEA." *Id.* at 1265. We held that False Claims Act liability can attach under the theory of false certification, although the relators had not presented sufficient evidence of fraud. *Id.*

In *Anton*, we explained the theory of false certification, identifying two major considerations: "'(1) whether the false statement is the cause of the Government's providing the benefit; and (2) whether any relation exists between the subject matter of the false statement and the event triggering Government's [sic] loss.'" *Id.* at 1266 (quoting John T. Boese, *Civil False Claims and Qui Tam Actions* 1-29 to 1-30 (1995)). We also held that "[m]ere regulatory violations do not give rise to a viable FCA action," but rather, "[i]t is the false *certification* of compliance which creates liability when certification is a prerequisite to obtaining a government benefit." *Id.* at 1266-67 (emphasis in original). From the principles underlying these two statements, we created four conditions necessary to succeed on the false certification theory of False Claims Act liability.

First, we emphasized the necessity of a *false* claim, rather than a mere unintentional violation. We did not hold in *Anton* that regulatory violations will go unchecked by the

False Claims Act, but we did agree with the lower court's reasoning that for a "breach of contract, or violation of regulations or law, or receipt of money from the government" to give rise to an action under the False Claims Act, "[i]t requires a false claim." 91 F.3d at 1265. We went on to note that the "fatal defect" in *Anton* was not that the claimed infraction was a regulatory violation, but that there was a "lack of a false claim." *Id.* at 1267. Thus, we established that to succeed on a false certification theory, some falsity must be alleged.

Second, we emphasized the central importance of the scienter element to liability under the False Claims Act, holding that false claims must in fact be "false when made." *Id.* (citing *United States v. Shah*, 44 F.3d 285, 290 (5th Cir. 1995)). In fact, we held, "[f]or a certified statement to be 'false' under the Act, it must be an intentional, palpable lie." *Id.* (citing *Hagood v. Sonoma County Water Agency*, 81 F.3d 1465, 1478 (9th Cir. 1996)). We also noted that "some request for payment containing falsities made with scienter (*i.e.*, with knowledge of the falsity and with intent to deceive) must exist." *Id.* at 1265. In short, we made clear that a palpably false statement, known to be a lie when it is made, is required for a party to be found liable under the False Claims Act.

We note that the University and the district court below have taken our holdings to mean that the word "certification" has some paramount and talismanic significance, apparently believing that a palpably false *statement* does not bring with it False Claims liability, while a palpably false *certification* will. This facile distinction would make it all too easy for claimants to evade the law. The Fourth Circuit rightly noted that False Claims liability attaches "*because of the fraud* surrounding the efforts to obtain the contract or benefit status, or the payments thereunder." *Harrison*, 176 F.3d at 788 (emphasis added). That the theory of liability is commonly called "false certification" is no indication that "certification"

is being used with technical precision, or as a term of art; the theory could just as easily be called the "false statement of compliance with a government regulation that is a precursor to government funding" theory, but that is not as succinct. Furthermore, because the word "certification" does not appear in 31 U.S.C. § 3729(a)(1) or (a)(2), there is no sense in parsing it with the close attention typically attending an exercise in statutory interpretation. So long as the statement in question is knowingly false when made, it matters not whether it is a certification, assertion, statement, or secret handshake; False Claims liability can attach.

Third, we held that the false statement or course of conduct must be material to the government's decision to pay out moneys to the claimant. This is plain from our focus on "(1) whether the false statement is the cause of the Government's providing the benefit; and (2) whether any relation exists between the subject matter of the false statement and the event triggering Government's [sic] loss." *Anton*, 91 F.3d at 1266. We also stated that the relevant certification of compliance must be both a "prerequisite to obtaining a government benefit," *id.*, and a "*sine qua non* of receipt of [government] funding," *id.* at 1267. We further held that the government funding must be "conditioned" upon certifications of compliance. *Id.*

This approach has been followed by a number of other circuits to adopt the false certification theory of false claims liability.[1] *See Mikes*, 274 F.3d at 699 (holding that false cer-

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[1] Some courts, such as the Court of Federal Claims, have adopted a version of the false certification theory whereby the certification need only be implied, rather than express. In those cases, if a party submits a claim for payment under a government program with requirements for participation, that claim is taken as an implied certification that the party was in compliance with those program requirements. *See Ab–Tech Constr., Inc. v. United States*, 31 Fed.Cl. 429, 434 (Fed. Cl. 1994).

tification theory applies when "governing federal rules . . . are a precondition to payment"); *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 902 (5th Cir. 1997) (holding that false claims liability attaches only "where the government has conditioned payment of a claim upon a claimant's certification of compliance with . . . a statute or regulation"); *Ab-Tech Constr., Inc. v. United States*, 31 Fed.C1. 429, 434 (Fed. C1. 1994) (holding that false statement of compliance must be "critical to the decision to pay"), *aff'd*, 57 F.3d 1084 (Fed. Cir. 1995). Once again, we note that there is no special significance to the term "certification" in determining materiality; the question is merely whether the false certification—or assertion, or statement—was relevant to the government's decision to confer a benefit.

Fourth and most obviously, for a false statement or course of action to be actionable under the false certification theory of false claims liability, it is necessary that it involve an actual *claim*, which is to say, a call on the government fisc. This is self-evident from the statutory language, of course, which requires a "claim paid or approved by the Government." 31 U.S.C. § 3729(a)(2). In *Anton*, the case involved direct receipt of federal funding, but we agree with the Fourth Circuit that a claim arises whenever the government is asked to "pay out money or to forfeit moneys due." *Harrison*, 176 F.3d at 788.

[Footnote continued from previous page]

Here, we need not address the viability of this theory, because it is beyond dispute that the University signed the written Program Participation Agreement, thus making an express statement of compliance.

B. Promissory Fraud

Another approach to finding False Claims Act liability in the absence of an explicitly false claim is the "promissory fraud" or "fraud-in-the-inducement" theory. This theory, rather than specifically requiring a false statement of compliance with government regulations, is somewhat broader. It holds that liability will attach to each claim submitted to the government under a contract, when the contract or extension of government benefit was originally obtained through false statements or fraudulent conduct. *See, e.g., id.*, 176 F.3d at 787; *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 542, 63 S.Ct. 379, 87 L.Ed. 443 (1943). In *Hess*, the Supreme Court found contractors liable under the False Claims Act for claims submitted under government contracts that the defendants obtained via collusive bidding. *Id.* The Court determined that "[t]his fraud did not spend itself with the execution of the contract," and so each claim submitted under the contracts constituted a false or fraudulent claim. *Id.* at 543, 63 S.Ct. 379. In other words, subsequent claims are false because of an *original fraud* (whether a certification or otherwise).

The Seventh Circuit recently adopted a version of the promissory fraud theory in a case almost identical to this one, *United States ex rel. Main v. Oakland City Univ.*, 426 F.3d 914 (7th Cir. 2005), *cert. denied*, — U.S. —, 126 S.Ct. 1786, 164 L.Ed.2d 519 (2006). Relators in *Main* alleged liability under the False Claims Act based on an Oakland City University representation that it would comply with the incentive compensation ban, despite its knowledge of the ban and intent not to comply. *See id.* at 916. As here, the district court dismissed the case for failure to state a claim, ruling that even willful falsehoods in a "phase-one application" do not violate the False Claims Act, because such an application requests a declaration of eligibility rather than an immediate payment from the treasury. *See id.* The district court further ruled that the "phase two" applications for funds are not false, because

they do not repeat the assurance that the University abides by the rule against paying contingent fees to recruiters. *See id.*

The Seventh Circuit reversed, analyzing the claim under a promissory fraud theory, and holding that the relators had stated a claim based upon allegations of fraud in the inducement of the original Program Participation Agreement. *See id.* The court did not address the false certification theory directly, although it implicitly recognized that the district court had rejected relator's arguments on that ground. Pursuant to the plain language of 31 U.S.C. § 3729(a)(2), the court determined that False Claims Act liability was clear: "[t]he University 'uses' its phase-one application (and the resulting certification of eligibility) when it makes (or 'causes' a student to make or use) a phase-two application for payment. No more is required under the statute." *Id.*

We find the Seventh Circuit's reasoning in adopting the promissory fraud theory persuasive. We also note that the promissory fraud theory, in substance, is not so different from the false certification theory, and even requires the same elements. For instance: first, a claim must be false and, second, that falsity must be knowingly perpetrated. The Seventh Circuit opined eloquently on this point:

> To prevail in this suit [relator] must establish that the University not only knew . . . that contingent fees to recruiters are forbidden, but also planned to continue paying those fees while keeping the Department of Education in the dark. This distinction is commonplace in private law: failure to honor one's promise is (just) breach of contract, but making a promise that one *intends* not to keep is fraud . . . . [I]f the University knew about the rule and told the Department that it would comply, while planning to do otherwise, it is exposed to penalties under the False Claims Act.

Id. at 917 (emphasis in original) (citations omitted). We, too, have held that for promissory fraud to be actionable under the False Claims Act, "the promise must be false when made." *Anton*, 91 F.3d at 1267. We have also noted that "[i]nnocent mistakes, mere negligent misrepresentations and differences in interpretations" are not sufficient for False Claims Act liability to attach. *Id.* In short, therefore, under a promissory fraud theory, relator must allege a false or fraudulent course of conduct, made with scienter.

Third, as with the false certification theory, the promissory fraud theory requires that the underlying fraud be material to the government's decision to pay out moneys to the claimant. The Seventh Circuit in *Main* stated that the False Claims Act requires "a causal rather than a temporal connection between fraud and payment," 426 F.3d at 916, and we agree. And fourth and finally, there must exist a *claim*—a call on the government fisc. As the Seventh Circuit rightly noted, the precise logistical details of how the claim is made—with respect to timing, for instance, or the number of stages involved—are immaterial: "[i]f a false statement is integral to a causal chain leading to payment, it is irrelevant how the federal bureaucracy has apportioned the statements among layers of paperwork." *Id.* In other words, for there to exist a "claim" for purposes of False Claims Act liability, it must involve merely some sort of request for the government to pay out money or forfeit moneys due.

III.

Thus, as the above analysis shows, under either the false certification theory or the promissory fraud theory, the essential elements of False Claims Act liability remain the same: (1) a false statement or fraudulent course of conduct, (2) made with scienter, (3) that was material, causing (4) the government to pay out money or forfeit moneys due. The question remaining is whether relators in this case have alleged facts satisfying all four of these elements.

A. Falsity

Relators allege a false statement or course of conduct. They allege that the University violates a statutory requirement, the incentive compensation ban, to which it agreed in writing in the Program Participation Agreement. They allege that the University establishes policies of violating that requirement, and encourages its employees to violate that requirement. They allege specific instances of violation, where higher salaries, benefits, and incentives were given in response to increased enrollment. And they allege that the University did so knowingly, and with the specific intent to deceive the government. Thus, relators properly allege a false statement or course of conduct.

B. Scienter

Relators allege a false statement or course of conduct made knowingly and intentionally. They allege that University staff openly bragged about perpetrating a fraud, that the University had an established infrastructure to deceive the government, and that the University repeatedly changed its policies to hide its fraud. In other words, relators allege that the University provided statements to the government that were "intentional, palpable lie[s]," made with "knowledge of the falsity and with intent to deceive." *Anton*, 91 F.3d at 1265, 1267.

The University argues that the incentive compensation ban is nothing more than one of hundreds of boilerplate requirements with which it promises compliance. This may be true, but fraud is fraud, regardless of how "small." The University is worried that our holding today opens it up to greater liability for innocent regulatory violations, but that is not the case—as we held above, innocent or unintentional violations do not lead to False Claims Act liability. But that is no reason to innoculate institutions of higher education from liability when they *knowingly* violate a regulatory condition, with the intent to deceive, as is alleged here. Relators

properly allege false statements or courses of conduct made with scienter.

C. Materiality

Most of the argument in this case centers on whether and how much the University's alleged fraud was material to the government's decision to disburse federal funds. The parties argue at length over, for instance, the enforcement power of the DOE, and whether its authority to take "emergency action"—to withhold funds or impose sanctions where it has information that statutory requirements are being violated—means that the statutory requirements are causally related to its decision to pay out moneys due.

These questions of enforcement power are largely academic, because the eligibility of the University under Title IV and the Higher Education Act of 1965—and thus, the funding that is associated with such eligibility—is *explicitly* conditioned, in three different ways, on compliance with the incentive compensation ban. First, a federal statute states that in order to be eligible, an institution must

> enter into a program participation agreement with the Secretary [of Education]. The agreement *shall condition* the initial and continuing eligibility of an institution to participate in a program *upon compliance* with the following requirements ... [including the incentive compensation ban.]

20 U.S.C. § 1094(a) (emphasis added). Second, a federal regulation specifies:

> An institution may participate in any Title IV, HEA program ... *only if* the institution enters into a written program participation agreement with the Secretary.... A program participation agreement *conditions* the initial and continued participation of an eligible institution in any Title IV, HEA program *upon compliance*

> with the provisions of this part [such as the incentive compensation ban.]

34 C.F.R. § 668.14(a)(1) (emphasis added). Third and finally, the program participation agreement itself states:

> The execution of this Agreement [which contains a reference to the incentive compensation ban] by the Institution and the Secretary is a *prerequisite* to the Institution's initial or continued participation in any Title IV, HEA program.

(emphasis added). All of the emphasized phrases in the above passages demonstrate that compliance with the incentive compensation ban is a necessary condition of continued eligibility and participation: compliance is a "prerequisite" to funding; funding shall occur "only if" the University complies; funding shall be "condition[ed] . . . upon compliance." These are not ambiguous exhortations of an amorphous duty. The statute, regulation, and agreement here all explicitly condition participation and payment on compliance with, among other things, the precise requirement that relators allege that the University knowingly disregarded.

The University argues that the ban is merely a condition of *participation*, not a condition of *payment*. But in this case, that is a distinction without a difference. In the context of Title IV and the Higher Education Act, if we held that conditions of participation were not conditions of payment, there would be no conditions of payment at all—and thus, an educational institution could flout the law at will.

To see why this is so, one only need look at the University's semantic argument, in which it claims that for a condition of participation, an institution says it "'*will*' comply" with various statutes and regulations, but for a condition of payment, an institution says that it "*has* complied." This grammatical haggling is unmoored in the law, and it is undercut by the Program Participation Agreement itself. In the

section that the University concedes contains conditions of payment—the section entitled "Certifications Required From Institutions"—the University agrees that it "will" or "shall" comply with various regulations no less than six times. Under the University's logic, these future-tense assertions could not be conditions of payment, and yet it concedes that they are. Its concession is correct; these, and all other promises to comply with the Program Participation Agreement, are conditions of payment. These conditions are also "prerequisites," and "the *sine qua non*" of federal funding, for one basic reason: if the University had not agreed to comply with them, it would not have gotten paid.

Furthermore, we take the University's argument to mean that it believes if it had signed an agreement that stated "the University of Phoenix certifies that it has complied with the incentive compensation ban," then it would have signed a condition of payment. But the DOE and the United States Congress, as evidenced by the statutes, regulations, and contracts implementing the Title IV and Higher Education Act requirements for funding, quite plainly care about an institution's ongoing conduct, not only its past compliance. For purposes of federal funding, the University is not permitted to merely have a history of compliance with the applicable regulations; it must also agree to comply in the future. The Program Participation Agreement, constraining its ongoing conduct, is the condition of payment that the federal government requires—a promise that the University shall not break the law, not merely an assertion that it has not broken the law *yet*. If such promises were not conditions of payment, the University would be virtually unfettered in its ability to receive funds from the government while flouting the law. This cannot be what Congress and the DOE intend when they ask institutions to sign Program Participation Agreements.

Nor was such laissez-faire compliance what the Second Circuit had in mind, we think, when it developed the "participation versus payment" distinction in the first place. The

case in which that distinction was first mentioned, *Mikes v. Straus*, is completely distinguishable from the case before us. There, in the Medicare context, the defendant was subject to a statutory requirement that stated:

> "[i]t shall be the obligation" of a practitioner who provides a medical service "for which payment may be made . . . to assure" compliance with [42 U.S.C. § 1320c-5(a)].

274 F.3d. at 701. "Compliance," in that instance, meant maintaining an appropriate standard of care, which was ensured by peer review and extensive monitoring. Dereliction of that duty would result in sanctions only where "a violation was especially gross and flagrant." *Id.* at 702. Defendants were accused of not maintaining the appropriate standard of care, but the Second Circuit held that such a violation could not constitute a breach of a condition of payment under the Medicare statute. This makes sense for two interrelated reasons. First, the statutory duty was not to promise *compliance*, but to promise *assurance* of compliance. The fact that defendants did not meet the appropriate standard of care does not necessarily mean that they were ignoring their duty to try their best to comply; rather, it may have indicated merely that they were not doing a very good job. If the allegation had been that the defendants in *Mikes* were not even trying to comply—that they were not only failing to provide the appropriate standard of care, but also affirmatively and knowingly choosing not to—we imagine the *Mikes* case would have come out differently.

And even if it would not have, the *Mikes* court was dealing with the Medicare context, to which the court specifically confined its reasoning. *Id.* at 700. It imposed an additional requirement on Medicare cases: that the underlying statute "expressly" condition payment on compliance. An explicit statement, however, is not necessary to make a statutory re-

quirement a condition of payment, and we have never held as much.

Therefore, because relators have alleged that the University fraudulently violated a regulation upon which payment is expressly conditioned in three different ways, we hold that they have properly alleged the University engaged in statements or courses of conduct that were *material* to the government's decision with regard to funding.

D. Claim

Finally, relators allege that the University submitted a claim against the government fisc. Relators allege that the University submits false claims in a number of ways—either by submitting requests for Pell Grant funds directly to DOE, resulting in a direct transfer of the funds into a University account, or by submitting requests to private lenders for government-insured loans. We agree with the Seventh Circuit that "it is irrelevant how the federal bureaucracy has apportioned the statements among layers of paperwork." *Main*, 426 F.3d at 916. All that matters is whether the false statement or course of conduct causes the government to "pay out money or to forfeit moneys due." *Harrison*, 176 F.3d at 788. Relators have properly alleged that the University submitted a claim, for purposes of False Claims Act liability.

IV.

Accordingly, because relators in this case have properly alleged (1) a false statement or fraudulent course of conduct, (2) made with scienter, (3) that was material, causing (4) the government to pay out money or forfeit moneys due, their cause of action under the False Claims Act survives a motion to dismiss, and the decision of the district court is

REVERSED.

APPENDIX B

United States District Court, E.D. California.

UNITED STATES OF AMERICA, ex rel. Mary Hendow and Julie Albertson, Plaintiffs,

v.

UNIVERSITY OF PHOENIX, Defendant.

No. CV S-03-457 GEB DAD.

May 20, 2004.

Daniel Robert Bartley, Attorney at Law, Novato, CA, Nancy Gail Krop, Law Office of Nancy Krop, Burlingame, CA, for Plaintiffs.

Bryan B. Arnold, Gibson Dunn and Crutcher, Los Angeles, CA, for Defendant.

ORDER[*]

Defendant University of Phoenix ("UOP") moves to dismiss Relators' Second Amended Complaint ("SAC"), arguing it fails to allege UOP submitted a false or fraudulent claim for payment to the United States in violation of the False Claims Act ("FCA").

Relators allege that an educational institution such as UOP seeking to participate in certain federal student financial aid programs must enter an agreement with the government promising that it will not compensate enrollment counselors

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[*] This matter was determined to be suitable for decision without oral argument. L.R. 78-230(h). BURRELL, J.

based on the number of students who enroll. (SAC ¶ ¶ 14, 24.) Relators further allege that UOP enters such an agreement annually, and knows it will breach that agreement because it compensates enrollment counselors based on the number of students who enroll. (*Id.* ¶ 29.)

UOP argues Relators' FCA claims must be dismissed because Relators do not allege "*an actual false claim* for payment being made to the Government." *United States v. Kitsap Physicians Service*, 314 F.3d 995, 1002 (9th Cir. 2002). "The False Claims Act . . . focuses on the submission of a claim, and does not concern itself with whether or to what extent there exists a menacing underlying scheme." *Id.*

Relators allege "UOP submits a request for [financial aid] funds directly to the Secretary of the United States Department of Education." (SAC ¶ 33.) But they do not allege that those claims contain express false statements. Instead, Relators argue that UOP's claims constitute "implied certification" that UOP is in compliance with its agreement with the government. A false certification of compliance with applicable law only gives rise to an FCA claim if certification of compliance with a particular statute is a prerequisite to obtaining a government benefit. *See United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1266 (9th Cir. 1996) (holding that false certification of compliance with federal disability laws did not give rise to FCA claim since payment was not conditional on certification). Relators contend that 20 U.S.C. § 1094(a) imposes such a certification requirement. 20 U.S.C. § 1094(a) provides:

> In order to be an eligible institution for the purposes of [participating in federal student financial aid programs,] an institution must . . . enter into a program participation agreement with the Secretary [of Education]. The agreement shall condition the initial and continuing eligibility of an institution to partici-

> pate in a program upon compliance with the following requirements:
>
> . . . .
>
> The institution will not provide any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any persons or entities engaged in any student recruiting or admission activities. . . .

Since this statute only requires that UOP enter into an agreement, and does not require a certification, Relators' argument is unpersuasive.

Relators alternatively argue that UOP's actions give rise to a "promissory fraud" FCA claim. Promissory fraud can be actionable where a claimant intentionally makes a "false certification" that it will comply with a particular law when such certification is "a prerequisite for the [claimant] to receive [federal] funds," and subsequently submits a claim for payment despite its failure to comply with that law. *Hopper*, 91 F.3d at 1267. Since Relators have not identified any certification which is a prerequisite for UOP to receive federal funds, this argument also fails.[1]

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[1] Relators also argue that UOP makes a certification in "'management assertion letters' written by UOP management for an annual compliance audit . . . performed by an independent certified public accountant." (SAC ¶ 30.) But Relators identify no statute or regulation which makes any certification in these letters a prerequisite to the receipt of federal funds.

UOP requests that the SAC be dismissed with prejudice, and Relators do not request leave to amend. Therefore, the SAC is dismissed with prejudice. Judgment shall be entered in favor of Defendant.

IT IS SO ORDERED.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

OCT 24 2006

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

MARY HENDOW; et al., Plaintiffs – Appellants, v. UNIVERSITY OF PHOENIX, Defendant – Appellee.	No. 04-16247 D.C. No. CV-03-00457-GEB Eastern District of California, Sacramento ORDER

Before: HALL, SILVERMAN, and GRABER, Circuit Judges.

The panel has voted to deny appellee's petition for panel rehearing and has recommended denial of the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

APPENDIX D

UNITED STATES DEPARTMENT OF EDUCATION
FEDERAL STUDENT AID
CASE MANAGEMENT & OVERSIGHT

PROGRAM PARTICIPATION AGREEMENT

Effective Date of Approval:	The date on which this Agreement is signed on behalf of the Secretary of Education
Approval Expiration Date:	June 30, 2007
Reapplication Date:	March 31, 2007
Name of Institution:	University of Phoenix
Address of Institution:	4615 East Elwood Street Phoenix, AZ 85040-1958
	OPE ID Number: 02098800 DUNS Number: 089306492

Taxpayer Identification Number (TIN): 860344364

The execution of this Agreement by the Institution and the Secretary is a prerequisite to the Institution's initial or continued participation in any Title IV, HEA Program.

The postsecondary educational institution listed above, referred to hereafter as the "Institution," and the United States Secretary of Education, referred to hereafter as the "Secretary," agree that the Institution may participate in those stu-

dent financial assistance programs authorized by Title IV of the Higher Education Act of 1965, as amended (Title IV, HEA Programs) indicated under this Agreement and further agrees that such participation is subject to the terms and conditions set forth in this Agreement. As used in this Agreement, the term "Department" refers to the U.S. Department of Education.

SCOPE OF COVERAGE

This Agreement applies to all locations of the Institution as stated on the most current ELIGIBILITY AND CERTIFICATION APPROVAL REPORT issued by the Department. This Agreement covers the Institution's eligibility to participate in each of the following listed Title IV, HEA programs, and incorporates by reference the regulations cited.

- FEDERAL PELL GRANT PROGRAM, *20 U.S.C. 1070a et seq; 34 CFR Part 690.*
- FEDERAL FAMILY EDUCATION LOAN PROGRAM, *20 U.S.C. 1071 et seq; 34 CFR Part 682.*
- FEDERAL DIRECT STUDENT LOAN PROGRAM, *20 U.S.C. 1087a et seq; 34 CFR Part 685.*
- FEDERAL PERKINS LOAN PROGRAM, *20 U.S.C. 1087aa et seq; 34 CFR Part 674.*
- FEDERAL SUPPLEMENTAL EDUCATIONAL OPPORTUNITY GRANT PROGRAM, *20 U.S.C. 1070b et seq; 34 CFR Part 676.*
- FEDERAL WORK-STUDY PROGRAM, *42 U.S.C. 2751 et seq; 34 CFR Part 675.*

GENERAL TERMS AND CONDITIONS

1. The Institution understands and agrees that it is subject to and will comply with the program statutes and implementing regulations for institutional eligibility as set forth in 34 CFR Part 600 and for each Title IV, HEA

program in which it participates, as well as the general provisions set forth in Part F and Part G of Title IV of the HEA, and the Student Assistance General Provisions regulations set forth in 34 CFR Part 668.
The recitation of any portion of the statute or regulations in this Agreement does not limit the Institution's obligation to comply with other applicable statutes and regulations.

2. a. The Institution certifies that on the date it signs this Agreement, it has a drug abuse prevention program in operation that it has determined is accessible to any officer, employee, or student at the Institution.

   b. The Institution certifies that on the date it signs this Agreement, it is in compliance with the disclosure requirements of Section 485(f) of the HEA (Campus Security Policy and Crime Statistics).

3. The Institution agrees to comply with—

   a. Title VI of the Civil Rights Act of 1964, as amended, and the implementing regulations, 34 CFR Parts 100 and 101 (barring discrimination on the basis of race, color or national origin);

   b. Title IX of the Education Amendments of 1972 and the implementing regulations, 34 CFR Part 106 (barring discrimination on the basis of sex);

   c. The Family Rights and Privacy Act of 1974 and the implementing regulations, 34 CFR Part 99;

   d. Section 504 of the Rehabilitation Act of 1973 and the implementing regulations, 34 CFR Part 104 (barring discrimination on the basis of physical handicap); and

   e. The Age Discrimination Act of 1975 and the implementing regulations, 34 CFR Part 110.

4. The Institution acknowledges that 34 CFR Parts 602 and 667 require accrediting agencies, State regulatory bodies, and the Secretary to share information about institutions. The Institution agrees that the Secretary, any accrediting agency recognized by the Secretary, and any State regulatory body may share or report information to one another about the Institution without limitation.

5. The Institution acknowledges that the HEA prohibits the Secretary from recognizing the accreditation of any institution of higher education unless that institution agrees to submit any dispute involving the final denial, withdrawal, or termination of accreditation to initial arbitration prior to any other legal action.

SELECTED PROVISIONS FROM GENERAL PROVISIONS REGULATIONS, 34 CFR PART 668

By entering into this Program Participation Agreement, the Institution agrees that:

(1) It will comply with all statutory provisions of or applicable to Title IV of the HEA, all applicable regulatory provisions prescribed under that statutory authority, and all applicable special arrangements, agreements, and limitations entered into under the authority of statutes applicable to Title IV of the HEA, including the requirement that the institution will use funds it receives under any Title IV, HEA program and any interest or other earnings thereon, solely for the purposes specified in and in accordance with that program;

(2) As a fiduciary responsible for administering Federal funds, if the institution is permitted to request funds under a Title IV, HEA program advance payment method, the institution will time its requests for funds under the program to meet the institution's immediate Title IV, HEA program needs;

(3) It will not request from or charge any student a fee for processing or handling any application, form, or data required to determine a student's eligibility for, and amount of, Title IV, HEA program assistance;

(4) It will establish and maintain such administrative and fiscal procedures and records as may be necessary to ensure proper and efficient administration of funds received from the Secretary or from students under the Title IV, HEA programs, together with assurances that the institution will provide, upon request and in a timely manner, information relating to the administrative capability and financial responsibility of the institution to—

(i) The Secretary;

(ii) The State [regulatory bodies] for the State or States in which the institution or any of the institution's branch campuses or other locations are located;

(iii) A guaranty agency, as defined in 34 CFR part 682, that guarantees loans made under the Federal Stafford Loan, and Federal PLUS programs for attendance at the institution or any of the institution's branch campuses or other locations;

(iv) The nationally recognized accrediting agency that accredits or preaccredits the institution or any of the institution's branch campuses, other locations, or educational programs;

(v) The State agency that legally authorizes the institution and any branch campus or other location of the institution to provide postsecondary education; and

(vi) In the case of a public postsecondary vocational educational institution that is approved by a State agency recognized for the approval of public postsecondary vocational education, that State agency;

(5) It will comply with the provisions of §668.15 relating to factors of financial responsibility;

(6) It will comply with the provisions of §668.16 relating to standards of administrative capability;

(7) It will submit reports to the Secretary and, in the case of an institution participating in the Federal Stafford Loan, Federal PLUS, or the Federal Perkins Loan Program, to holders of loans made to the institution's students under these programs at such times and containing such information as the Secretary may reasonably require to carry out the purpose of the Title IV, HEA programs;

(8) It will not provide any statement to any student or certification to any lender under the Federal Stafford Loan or Federal PLUS Program that qualifies the student for a loan or loans in excess of the amount that the student is eligible to borrow in accordance with §§425(a), 428(a)(2), 428(b)(1)(A) and (B), and 428H of the HEA;

(9) It will comply with the requirements of Subpart D of 34 CFR part §§668 concerning institutional and financial assistance information for students and prospective students;

(10) In the case of an institution that advertises job placement rates as a means of attracting students to enroll in the institution, it will make available to prospective students, at or before the time that those students apply for enrollment—

(i) The most recent available data concerning employment statistics, graduation statistics, and any other information necessary to substantiate the truthfulness of the advertisements; and

(ii) Relevant State licensing requirements of the State in which the institution is located for any job for which an educational program offered by the institution is designed to prepare those prospective students;

(11) In the case of an institution participating in the Federal Stafford Loan, or Federal PLUS Program, the institution will inform all eligible borrowers, as defined in 34 CFR part 682, enrolled in the institution about the availability and eligibility of those borrowers for State grant assistance from the State in which the institution is located, and will inform borrowers from another State of the source for further information concerning State grant assistance from that State;

(12) It will provide the certifications described in paragraph (c) of this section;

(13) In the case of an institution whose students receive financial assistance pursuant to section 484(d) of the HEA, the institution will make available to those students a program proven successful in assisting students in obtaining the recognized equivalent of a high school diploma;

(14) It will not deny any form of Federal financial aid to any eligible student solely on the grounds that the student is participating in a program of study abroad approved for credit by the institution;

(15) In the case of an institution seeking to participate for the first time in the Federal Stafford Loan and Federal PLUS programs, the institution has included a default management plan as part of its application under §600.20 for participation in those programs and will use the plan for at least two years from the date of that application. The Secretary considers the requirements of this paragraph to be satisfied by a default management plan developed in accordance with the default reduction measures described in the June 2001 Dear Partner Letter, GEN-01-08;

(16) In the case of an institution that changes ownership that results in a change of control, or that changes its status as a main campus, branch campus, or an additional location, the institution will, to participate in the Federal Stafford Loan and Federal PLUS Programs, develop a default management

plan for approval by the Secretary and implement the plan for at least two years after the change in control or status. The Secretary considers the requirements of this paragraph to be satisfied by a default management plan developed in accordance with the default reduction measures described in the June 2001 Dear Partner Letter, GEN-01-08;

(17) The Secretary, guaranty agencies and lenders as defined in 34 CFR Part 682, nationally recognized accrediting agencies, the Secretary of Veterans Affairs, State [regulatory bodies], State agencies recognized under 34 CFR part 603 for the approval of public postsecondary vocational education, and State agencies that legally authorize institutions and branch campuses or other locations of institutions to provide postsecondary education, have the authority to share with each other any information pertaining to the institution's eligibility for or participation in the Title I, HEA programs or any information on fraud and abuse;

(18) It will not knowingly—

(i) Employ in a capacity that involves the administration of the Title IV, HEA programs or the receipt of funds under those program, an individual who has been convicted of, or has pled *nolo contendere* or guilty to, a crime involving the acquisition, use, or expenditure of Federal, State, or local government funds, or has been administratively or judicially determined to have committed fraud or any other material violation of law involving Federal, State, or local government funds;

(ii) Contract with an institution or third-party servicer that has been terminated under section 432 of the HEA for a reason involving the acquisition, use, or expenditure of Federal, State, or local government funds, or that has been administratively or judicially determined to have committed fraud or any other material violation of law involving Federal, State, or local government funds; or

(iii) Contract with or employ any individual, agency, or organization that has been, or whose officers or employees have been—

(A) Convicted of, or pled *nolo contendere* or guilty to, a crime involving the acquisition, use, or expenditure of Federal, State, or local government funds; or

(B) Administratively or judicially determined to have committed fraud or any other material violation of law involving Federal, State, or local government funds;

(19) It will complete, in a timely manner and to the satisfaction of the Secretary, surveys conducted as a part of the Integrated Postsecondary Education Data System (IPEDS) or any other Federal collection effort, as designated by the Secretary, regarding data on postsecondary institutions;

(20) In the case of an institution that offers athletically related student aid, it will comply with the provisions of paragraph (d) of this section;

(21) It will not impose any penalty, including, but not limited to, the assessment of late fees, the denial of access to classes, libraries, or other institutional facilities, or the requirement that the student borrow additional funds for which interest or other charges are assessed, on any student because of the student's inability to meet his or her financial obligations to the institution as a result of the delayed disbursement of the proceeds of a Title IV, HEA program loan due to compliance with statutory and regulatory requirements of or applicable to the Title IV, HEA programs, or delays attributable to the institution;

(22) It will not provide nor contract with any entity that provides, any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any persons or entities engaged in any student recruiting or admission activities or in making decisions regarding the awarding of student financial assis-

tance, except that this requirement shall not apply to the recruitment of foreign students residing in foreign countries who are not eligible to receive Federal Student Assistance. This provision does not apply to the giving of token gifts to students or alumni for referring students for admission to the institution as long as: the gift is not in the form of money, check, or money order; no more than one such gift is given to any student or alumnus; and the gift has a value of not more than $100;

(23) It will meet the requirements established pursuant to Part H of Title IV of the HEA by the Secretary, State [authorizing bodies], and nationally recognized accrediting agencies;

(24) It will comply with the refund provisions established in 34 CFR Part 668.22;

(25) It is liable for all improperly administered funds received or refunded under the Title IV, HEA programs, including any funds administered by a third-party servicer;

(26) If the stated objectives of an educational program of the institution are to prepare a student for gainful employment in a recognized occupation, the institution will—

(i) Demonstrate a reasonable relationship between the length of the program and entry level requirements for the recognized occupation for which the program prepares the student. The Secretary considers the relationship to be reasonable if the number of clock hours provided in the program does not exceed by more than 50 percent the minimum number of clock hours required for training in the recognized occupation for which the program prepares the student, as established by the State in which the program is offered, if the State has established such a requirement, or as established by any Federal agency; and

(ii) Establish the need for the training for the student to obtain employment in the recognized occupation for which the program prepares the student.

(c) In order to participate in any Title IV, HEA program (other than the SSIG and NEISP programs), the institution must certify that it—

(1) Has in operation a drug abuse prevention program that the institution has determined to be accessible to any officer, employee, or student at the institution; and

(2)(i) Has established a campus security policy in accordance with section 485(f) of the HEA; and

(ii) Has complied with the disclosure requirements of §668.47 as required by section 485(f) of the HEA.

(d) In order to participate in any Title IV, HEA program (other than the SSIG and NEISP programs), an institution that offers athletically related student aid must—

(1) Cause an annual compilation, independently audited not less often than every 3 years, to be prepared within 6 months after the end of the institution's fiscal year, of—

(i) The revenues derived by the institution from the institution's intercollegiate athletics activities, according to the following categories:

(A) Total revenues.

(B) Revenues from football.

(C) Revenues from men's basketball.

(D) Revenues from women's basketball.

(E) Revenues from all other men's sports combined.

(F) Revenues from all other women's sports combined;

(ii) Expenses made by the institution for the institution's intercollegiate athletics activities, according to the following categories:

(A) Total expenses.

(B) Expenses attributable to football.

(C) Expenses attributable to men's basketball.

(D) Expenses attributable to women's basketball.

(E) Expenses attributable to all other men's sports combined.

(F) Expenses attributable to all other women's sports combined; and

(iii) The total revenues and operating expenses of the institution; and

(2) Make the compilation and, where allowable by State law, the results of the audits required by paragraph (d)(1) of this section available for inspection by the Secretary and the public.

(e) For the purposes of paragraph (d) of this section—

(1) Revenues from intercollegiate athletics activities allocable to a sport shall include without limitation gate receipts, broadcast revenues and other conference distributions, appearance guarantees and options, concessions, and advertising;

(2) Revenues such as student activities fees, alumni contributions, and investment interest income that are not allocable to a sport shall be included in the calculation of total revenues only;

(3) Expenses for intercollegiate athletics activities allocable to a sport shall include without limitation grants-in-aid, salaries, travel, equipment, and supplies; and

(4) Expenses such as general and administrative overhead that are not allocable to a sport shall be included in the calculation of total expenses only.

(f)(1) A program participation agreement becomes effective on the date that the Secretary signs the agreement.

(2) A new program participation agreement supersedes any prior program participation agreement between the Secretary and the institution.

(g)(1)(i) With respect to an institution that has been certified *other than under a provisional certification*—

(A) Except as provided in paragraphs (h) and (i) of this section, the Secretary terminates a program participation agreement through the proceedings in subpart G of this part.

(B) An institution may terminate a program participation agreement.

(C) If the Secretary or the institution terminates a program participation agreement under paragraph (g) of this section, the Secretary establishes the termination date.

(2) With respect to an institution that has been *provisionally certified,* the Secretary revokes a provisional certification through the proceedings in §668.13(d).

(h) An institution's program participation agreement automatically expires on the date that—

(1) The institution changes ownership that results in a change in control as determined by the Secretary under 34 CFR part 600; or

(2) The institution's participation ends under the provisions of §668.26(a)(1), (2), (4), or (7).

(i) An institution's program participation agreement no longer applies to or covers a location of the institution as of the date on which that location ceases to be a part of the participating institution.

WILLIAM D. FORD FEDERAL DIRECT LOAN PROGRAM

If an institution participates in the William D. Ford Federal Direct Loan (Direct Loan) Program, the institution and its representatives shall comply with the statute, guidelines,

and regulations governing the Title IV, Part D, William D. Ford Federal Direct Loan Program as required by Section 454 of Public Law 103-66.

The institution will:

1. Provide for the establishment and maintenance of a Direct Loan Program at the Institution that will:

   Identify eligible students who seek student financial assistance in accordance with Section 484 of the Higher Education Act of 1965, as amended (the HEA).

   Estimate the need of students as required under Title IV, Part F of the HEA.

   Provide a certification statement of eligibility for students to receive loans that will not exceed the annual or aggregate limits, except the Institution may exercise its authority, under exceptional circumstances identified by the Secretary, to refuse to certify a statement that permits a student to receive a loan, or certify a loan amount that is less than the student's determination of need, if the reason for such action is documented and provided in written form to a student.

   Establish a schedule for disbursement of loan proceeds to meet the requirements of Section 428G of the HEA.

   Provide timely and accurate information to the Secretary concerning 1) the status of borrowers while students are in attendance, any new information pertaining to the status of student borrowers of which the Institution becomes aware after the student leaves the Institution, and 2) the utilization of Federal funds under Part D at such times and in such manner as prescribed by the Secretary.

2. Comply with requirements established by the Secretary relating to student loan information with respect to the Direct Loan Program.

3. Provide that students at the Institution and their parents (with respect to such students) will be eligible to participate in the programs under Title IV, Part B of the HEA, Federal Family Education Loan programs, at the discretion of the Secretary for the period during which such Institution participates in the Direct Loan Program, except that a student or parent may not receive loans under both Part B and Part D of the HEA for the same period of enrollment.

4. Provide for the implementation of a quality assurance system, as established by the Secretary and developed in consultation with Institutions of higher education, to ensure that the Institution is complying with program requirements and meeting program objectives.

5. Provide that the Institution will not charge any fees of any kind, regardless of how they are described, to student or parent borrowers for loan application, or origination activities (if applicable), or the provision and processing of any information necessary for a student or parent to receive a loan under Part D of the HEA.

6. Provide that the Institution will originate loans to eligible students and parents in accordance with the requirements of Part D of the HEA and use funds advanced to it solely for that purpose (Option 2 only).

7. Provide that the note or evidence of obligation of the loan shall be the property of the Secretary (Options 2 and 1 only).

8. Implement such other provisions as the Secretary determines are necessary to protect the interest of the United States and to promote the purposes of Part D of the HEA.

9. Accept responsibility and financial liability stemming from its failure to perform its functions under this Program Participation Agreement.

The Institution's continued approval to participate in the Direct Loan Program will be based on the Department of Education's review and approval of the Institution's future applications for recertification to continue participating in the federal student aid programs.

CERTIFICATIONS REQUIRED FROM INSTITUTIONS

The Institution should refer to the regulations cited below. Signature on this Agreement provides for compliance with certification requirements under 34 CFR Part 82, "New Restrictions on Lobbying," and 34 CFR Part 85, "Government-wide Debarment and Suspension (Nonprocurement) and Government-wide Requirement for Drug-Free Workplace (Grants)." Breach of any of these certificates constitutes a breach of this Agreement.

PART 1 CERTIFICATION REGARDING LOBBYING; DEBARMENT, SUSPENSION AND OTHER RESPONSIBILITY MATTERS; AND DRUG-FREE WORKPLACE REQUIREMENTS

1. Lobbying

As required by Section 1352, Title 31 of the U.S. Code, and implemented at 34 CFR Part 82, for persons entering into a grant or cooperative agreement over $100,000, as defined at 34 CFR Part 82, Sections 82.105, and 82.110, the Institution certifies that:

(a) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the making of any Federal grant; the entering into of any cooperative agreement, and the extension, continuation, renewal,

amendment, or modification of any Federal grant or cooperative agreement;

(b) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal Grant or cooperative agreement, the Institution shall complete and submit Standard Form – LLL, "Disclosure Form to Report Lobbying," in accordance with all subrecipients shall certify and disclose accordingly.

(c) The Institution shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subgrants, contracts under grants and cooperative agreements, and subcontracts) and that all subrecipients shall certify and disclose accordingly.

2. Debarment, Suspension, and Other Responsibility Matters

As required by Executive Order 12549, Debarment and Suspension, and implemented at 34 CFR Part 85, for prospective participants in primary covered transactions as defined at 34 CFR Part 85, Sections 85.105 and 85.110, the Institution certifies that it and its principals:

(a) Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any Federal department or agency;

(b) Have not within a three-year period preceding this application been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State, or local)

transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property.

(c) Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State, or local) with commission of any of the offenses enumerated in paragraph (1)(b) of this certification; and

(d) Have not within a three-year period preceding this application had one or more public transactions (Federal, State, or local) terminated for cause or default.

3. Drug-Free Workplace (Grantees Other Than Individuals)

As required by the Drug-Free Workplace Act of 1988, and implemented at 34 CFR Part 85, Subpart F, for grantees, as defined at 34 CFR Part 85, Sections 85.605, and 85.610—

The Institution certifies that it will or will continue to provide a drug-free workplace by:

(a) Publishing a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in the grantee's workplace and specifying the actions that will be taken against employees for violation of such prohibition;

(b) Establishing an on-going drug-free awareness program to inform employees about—

(1) The dangers of drug abuse in the workplace;

(2) The Institution's policy of maintaining a drug-free workplace;

(3) Any available drug counseling, rehabilitation, and employee assistance programs; and

(4) The penalties that may be imposed upon employees for drug abuse violations occurring in the workplace;

(c) Making it a requirement that each employee to be engaged in the performance of the grant be given a copy of the statement required by paragraph (a);

(d) Notifying the employee in the statement required by paragraph (a) that, as a condition of employment under the grant, the employee will—

(1) Abide by the terms of the statement, and

(2) Notify the employer in writing of his or her conviction for a violation of a criminal drug statute occurring in the workplace no later than five calendar day after such conviction;

(e) Notifying the agency, in writing, within 10 calendar days after receiving notice under this subparagraph (d)(2) from an employee or otherwise receiving actual notice of such conviction. Employers of convicted employees must provide notice, including position title, to: Director, Grants and Contracts Service, U.S. Department of Education, 400 Maryland Avenue, S.W. (Room 3124, GSA Regional Office Building No. 3), Washington, DC 20202-5140. Notice shall include the identification number(s) of each affected grant;

(f) Taking one of the following actions, within 30 calendar days of receiving notice under subparagraph (d)(2), with respect to any employee who is so convicted—

(1) Taking appropriate personnel action against such an employee, up to and including termination, consistent with the requirements of the Rehabilitation Act of 1972, as amended; or

(2) Requiring such employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or

local health, law enforcement, or other appropriate agency;

(g) Making a good faith effort to continue to maintain a drug-free workplace through implementation of paragraphs (a), (b), (c), (d), (e), and (f).

4. Drug-Free Workplace (Grantees Who Are Individuals)

As required by the Drug-Free Workplace Act of 1988, and implemented at 34 CFR Part 85, Subpart F, for grantees, as defined at 34 CFR Part 85, Sections 85.605, and 85.610—

1. As a condition of the grant, the Institution certifies that it will not engage in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance in conducting any activity with the grant; and

2. If any officer or owner of the Institution is convicted of a criminal drug offense resulting from a violation occurring during the conduct of any grant activity, the Institution will report the conviction, in writing, within 10 calendar days of the conviction, to: Director, Grants and Contracts Service, U.S. Department of Education, 400 Maryland Avenue, S.W. (Room 3124, GSA Regional Office Building No. 3), Washington, DC 20202-5140. Notice shall include the identification number(s) of each affected grant.

PART 2 U.S. DEPARTMENT OF EDUCATION DRUG PREVENTION CERTIFICATION

The undersigned Institution certifies that it has adopted and implemented a drug prevention program for its students and employees that, at a minimum, includes—

1. The annual distribution in writing to each employee, and to each student who is taking one or more classes for any kind of academic credit except for continuing education units, regardless of the length of the student's program of study, of:

- Standards of conduct that clearly prohibit, at a minimum, the unlawful possession, use, or distribution of illicit drugs and alcohol by students and employees on its property or as part of any of its activities.
- A description of the applicable legal sanctions under local, State or Federal law for the unlawful possession or distribution of illicit drugs and alcohol.
- A description of the health risks associated with the use of illicit drugs and the abuse of alcohol.
- A clear statement that the Institution will impose disciplinary sanctions on students and employees (consistent with local, State and Federal law), and a description of those sanctions, up to and including expulsion or termination of employment and referral for prosecution, for violation of the standards of conduct. A disciplinary sanction may include the completion of an appropriate rehabilitation program.
- A description of any drug or alcohol counseling, treatment, or re-entry programs that are available to employees or students.

2. A biennial review by the Institution of its program to:
   - Determine its effectiveness and implement changes to the program if they are needed.
   - Ensure that its disciplinary sanctions are consistently enforced.

PART 3 CERTIFICATION REGARDING DEBARMENT, SUSPENSION, INELIGIBILITY, AND VOLUNTARY EXCLUSION—LOWER TIER COVERED TRANSACTIONS

The Institution is to obtain the signatures of Lower Tier Contractors on facsimiles of the certification reproduced below, and retain in the Institution's files.

CERTIFICATION BY LOWER TIER CONTRACTOR
(Before Completing Certification, Read Instructions for This Part 3 below)

(1) The prospective lower tier participant certifies by submission of this proposal, that neither it nor its principals are presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any Federal Department or Agency.

(2) Where the prospective lower tier participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

Name of Lower Tier Organization	PR/Award Number or Project Name
Name of Authorized Representative	Title of Authorized Representative
Signature of Authorized Representative	Date

1. By signing and submitting this proposal, the prospective lower tier participant is providing the certification set out below.

2. The certification in this clause is a material representation of fact upon which reliance was placed when this

transaction was entered into. If it is later determined that the prospective lower tier participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

3. The prospective lower tier participant shall provide immediate written notice to the person to which this proposal is submitted if at any time the prospective lower tier participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.

4. The terms "covered transactions," "debarred," "suspended," "ineligible," "lower tier covered transaction," "participant," "person," "primary covered transaction," "principal," "proposal," "voluntarily excluded," as used in this clause, have the meanings set out in the Definitions and Coverage sections of rules implementing Executive Order 12549. You may contact the person to whom this proposal is submitted for assistance in obtaining a copy of those regulations.

5. The prospective lower tier participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency with which this transaction originated.

6. The prospective lower tier participant further agrees by submitting this proposal that it will include the clause titled "Certification Regarding Debarment, Suspension, Ineligibility, and Voluntary Exclusion—Lower Tier Covered Transactions," without modification, in all

lower tier covered transactions and in all solicitations for lower tier covered transactions.

7. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that is not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the Nonprocurement List.

8. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

9. Except for transactions authorized under paragraph 5 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

NOTE: The "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion—Lower Tier Covered Transactions" form is to be retained by the Institution.

IN WITNESS WHEREOF

the parties hereto have caused this Agreement to be executed by their duly authorized representatives.

Signature of Institution's
Chief Executive Officer: /s/ Date 6/13/2003

Print Name and Title: Todd Nelson
President and Chief Executive Officer

For the Secretary: /s/ Date 7-2-2003
U.S. Department of Education

APPENDIX E

UNITED STATES DEPARTMENT OF EDUCATION

THE DEPUTY SECRETARY

October 30, 2002

MEMORANDUM

TO: Terri Shaw
Chief Operating Officer
Federal Student Aid

FROM: William D. Hansen /s/
Deputy Secretary

SUBJECT: Enforcement policy for violations of incentive compensation prohibition by institutions participating in student aid programs

The purpose of this memorandum is to provide direction with regard to the Department's response to violations of section 487(a)(20) of the Higher Education Act, which prohibits participating institutions' payment of incentive compensation to any persons or entities engaged in student recruiting where such payments are based on student enrollment.[1]

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[1] Section 487(a)(20) also references incentive compensation for individuals engaged in some activities other than recruiting on behalf of an institution. While there have been few occasions where improper compensation for those other activities has come to the Department's attention, those activities should also be considered as covered by the direction in this Memorandum.

The statutory prohibition was designed to reduce the financial incentive for an institution to enroll students by misrepresenting the quality of the institution, or the ability of students to benefit from its educational programs. The Department has in the past measured the damages resulting from a violation as the total amount of student aid provided to each improperly recruited student. After further analysis, I have concluded that the preferable approach is to view a violation of the incentive compensation prohibition as not resulting in monetary loss to the Department. Improper recruiting does not render a recruited student ineligible to receive student aid funds for attendance at the institution on whose behalf the recruiting is conducted. Accordingly, the Department should treat a violation of the law as a compliance matter for which remedial or punitive sanctions should be considered.

In some instances, violations of the prohibition, either themselves or in combination with other program violations, may constitute a basis for limitation, suspension, or termination action. However, much more commonly, the appropriate sanction to consider will be the imposition of a fine.

Violations of the prohibition are to be considered as consisting of the incentive payments to any persons or entities engaged in any student recruiting that relate to the number of students enrolled as a result of the recruiting. In determining the amount of a fine, the Office of Federal Student Aid (FSA) is to take into account the extent to which the institution appeared to be knowingly violating the law, as would be evidenced, for example, by attempts to disguise its compensation plan and by other aggravating factors, such as documented misrepresentations to prospective students. On the other hand, mitigating factors such as arguable reliance on Department guidance and on the reasonable advice of legal counsel, among other things, should also be taken into account. The size of the payments to persons or entities engaged in student recruiting and the pervasiveness of the improper practices across an institution's enrollments should

also bear on the magnitude of the fine to be imposed. In the exercise of its discretion, FSA may deem factors not described herein to be relevant to the determination of the amount of a fine.

The direction provided by this memorandum should result in the imposition of appropriately measured sanctions for improper incentive payments by institutions. I am confident that FSA will exercise sound discretion in assessing sanctions for violations of the incentive compensation prohibition.

cc: Brian W. Jones
General Counsel

Sally L. Stroup
Assistant Secretary, Office of Postsecondary Education